No. 82-243

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In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

FRANCIS V. PEREZ AND HILDA B. PEREZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the requirement of 8 C.F.R. 3.8(a) that motions to reopen deportation proceedings "be supported by affidavits or other evidentiary material," which this Court held to be mandatory in *INS* v. *Wang*, 450 U.S. 139 (1981), could be disregarded in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

FRANCIS V. PEREZ AND HILDA B. PEREZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the court of appeals (App. A, *infra*, 1a–2a) is reported at 643 F.2d 640. The order amending that opinion (App. B, *infra*, 3a) is reported at 665 F.2d 269. The opinion of the Board of Immigration Appeals (App. C, *infra*, 4a–5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1981. A petition for rehearing was denied on May 19, 1982 (App. D, *infra*, 6a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATION INVOLVED

8 C.F.R. 3.8(a) provides in pertinent part:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

STATEMENT

1. Respondents, who are husband and wife, are natives and citizens of the Republic of the Philippines. They entered the United States in 1971 and 1972, respectively, as nonimmigrant visitors authorized to remain until September 15, 1972. Because respondents stayed in this country beyond that date, deportation proceedings against them were instituted in 1977. R. 75, 79.[1]

At the deportation hearing, respondents admitted their deportability as nonimmigrants who had exceeded the period of their authorized stay, but requested the privilege of voluntary departure. An immigration judge granted respondents the privilege of voluntarily departing the United States on or before May 5, 1977. R. 68, 72, 74, 78.

Respondents did not leave the country by that date, however. Instead, they filed a motion to reopen their deportation proceedings and an application for a stay of deportation in order to allow them to apply for adjustment of status under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and because, they claimed, their deportation would result in the de facto

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[1] "R." refers to the certified administrative record.

Respondents were married shortly after Francis Perez' arrival in this country. Their citizen child was born on February 9, 1975. R. 21, 28.

deportation of their citizen child, in violation of his constitutional rights. R. 63–65. The immigration judge denied respondents' motion to reopen and application for a stay, and the Board of Immigration Appeals dismissed respondents' appeal. R. 43–45, 55.

2. On May 4, 1979, respondents filed a second motion to reopen deportation proceedings, claiming that changed circumstances rendered them eligible for the discretionary relief of suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). R. 10–14.[2] In their motion to reopen and application for suspension of deportation of Hilda Perez,[3] respondents alleged that deportation would result in "extreme hardship" to Hilda Perez and to respondents' citizen child. Specifically, respondents claimed that if they were deported they would lose their employment and their personal property, they most likely would be unable to reenter the United States, they would be separated from close relatives who are either citizens or lawful permanent residents of the United States, their citizen child would suffer more frequent nosebleeds, and they would be unable to conclude litigation pending in this country. However, while evidence of Hilda Perez' seven years of

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[2] 8 U.S.C. 1254(a)(1) provides that the Attorney General, in his discretion, may suspend the deportation of any alien who

> has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

[3] As of May 4, 1979, only Hilda Perez had satisfied the seven-year continuous physical presence requirement of 8 U.S.C. 1254(a)(1) (see note 2, *supra*).

continuous physical presence in the United States and both respondents' good moral character was attached to the suspension application, respondents presented no affidavits or other evidence in support of their allegations that extreme hardship would result from their deportation. R. 10–14. Respondents' submission thus violated 8 C.F.R. 3.8(a), which provides:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

The Board of Immigration Appeals denied the motion to reopen on the ground that respondents had failed to make a prima facie showing that either they or any other person would suffer extreme hardship if respondents were deported (App. C, *infra*, 4a–5a). In the absence of such a showing as to each of the requirements of eligibility for suspension relief, the Board held (*id.* at 5a), "reopening of these proceedings is not warranted. *See* 8 C.F.R. 3.8."

3. Respondents sought review of the Board's ruling in the court of appeals. The court vacated the Board's decision and remanded the case for a statement of "the factors [the Board] considered in concluding that the Perezes failed to establish a *prima facie* case of extreme hardship * * * based upon a record developed in accordance with 8 C.F.R. § 103.3." App. A, *infra*, 2a.[4]

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[4] We note that neither 8 C.F.R. 103.3 nor 8 C.F.R. 242.18(a), upon which the court of appeals relied to require the Board of Immigration Appeals, on remand, to develop a record in support of its denial of respondents' motion to reopen deportation proceedings, appears to have any application to a ruling by the Board on a motion to reopen. Section 242.18(a), by its terms, applies only to decisions by special inquiry officers. Similarly, 8 C.F.R. Part 103 is entitled "Powers and Duties of Service Officers; Availability of Service Record." Section 103.3 specifically refers to situations "[w]hen the applicant is entitled to appeal to *another* Service officer" (emphasis added). Because the Board is not itself a "Service officer," Section 103.3 would appear not to

In the final paragraph of its opinion, the court of appeals acknowledged "[t]he failure of the Perezes to support their petition [*sic*] with affidavits" (*ibid.*), but the court deemed respondents' failure to comply with 8 C.F.R. 3.8 merely "unfortunate" and announced that it would "be disregarded."

The INS filed a petition for rehearing with a suggestion for rehearing en banc, contending, *inter alia*, that the court of appeals' "disregard" of respondents' failure to support their motion to reopen with affidavits or other evidentiary material could not be reconciled with this Court's holding in *INS* v. *Wang*, 450 U.S. 139 (1981), that 8 C.F.R. 3.8(a)'s requirement of evidentiary support is valid and mandatory (450 U.S. at 143). Apparently recognizing that its attempt to distinguish *Wang* could not withstand analysis (see pages 7–8, *infra*), the court of appeals chose instead to ignore that decision and ordered its own prior opinion amended so as to delete the final paragraph (App. B, *infra*, 3a), while denying the petition for rehearing itself (App. D, *infra*, 6a). The court's judgment, requiring the Board to reconsider respondents' unsubstantiated claims on remand, thus remained unchanged.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case is in blatant disregard of a recent and controlling precedent of this Court. Such a result may be tolerated only at great expense to our judicial system.

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apply to its decisions. While we therefore believe that the court of appeals erred in holding that the Board was required on remand to state the factors it considered in concluding that respondents had not made a prima facie showing of extreme hardship (see also *Phinpathya* v. *INS*, 673 F.2d 1013, 1016–1017 (9th Cir. 1981), petition for cert. on other grounds pending, No. 82–91 (filed July 16, 1982); *Prapavat* v. *INS*, 662 F.2d 561, 562 (9th Cir. 1981) (per curiam); *Mejia-Carrillo* v. *INS*, 656 F.2d 520, 522–523 (9th Cir. 1981)), we are not seeking the Court's review of that issue here.

INS v. *Wang*, 450 U.S. 139 (1981), presented a situation virtually identical, both factually and procedurally, to this case. The aliens in *Wang*, like respondents here, had filed a second motion to reopen deportation proceedings in order to apply for suspension of deportation. *Id.* at 142. The Wangs had alleged "extreme hardship" because, if deported to Korea, they would be forced to liquidate their assets at a financial loss and because their children, neither of whom spoke Korean, would suffer from a lack of "educational opportunities." *Ibid.* Those allegations of "extreme hardship," like respondents' here, were neither sworn to nor otherwise supported by evidentiary materials. *Ibid.* As in the present case, the Board of Immigration Appeals denied the motion to reopen, concluding that the aliens had failed to make a prima facie showing that deportation would result in extreme hardship either to themselves or to their children, and the Ninth Circuit reversed. The court of appeals, sitting en banc, held that the suspension of deportation statute, 8 U.S.C. 1254, should be "liberally construed to effectuate its ameliorative purpose" and that the aliens had alleged a sufficient prima facie case of extreme hardship under the statute, as so construed, to entitle them to a hearing. 450 U.S. at 142–143.

This Court summarily reversed the judgment of the court of appeals, concluding that the Ninth Circuit had erred in

> ignor[ing] the regulation [8 C.F.R. 3.8(a)] which requires the alien seeking suspension to allege *and support by affidavit or other evidentiary material* the particular facts claimed to constitute extreme hardship. Here, the allegations of hardship were in the main conclusory and unsupported by affidavit. By requiring a hearing on such a motion, the Court of Appeals circumvented this aspect of the regulation * * *.

450 U.S. at 143 (emphasis added). The Court thus held that 8 C.F.R. 3.8(a) is valid and that the Board is entitled to insist on compliance with the regulation prior to ruling upon a motion to reopen. The Court stated that "the Government has a legitimate interest in creating official procedures for handling motions to reopen deportation proceedings so as readily to identify those cases raising new and meritorious considerations" (450 U.S. at 145).

In its original opinion in the present case, the Ninth Circuit purported to distinguish *Wang* on the ground that the allegations of extreme hardship in that case had been "conclusory," whereas respondents' allegations, although equally unsupported by evidentiary material, were "highly specific" (App. A, *infra*, 2a). As the court of appeals apparently recognized in amending its opinion (see App. B, *infra*, 3a), however, this is a meaningless distinction for the purpose of 8 C.F.R. 3.8(a)'s requirement that motions to reopen be supported by "affidavits or other evidentiary material." This Court has identified the "obvious[ ] design[ ]" of that requirement as being "to permit the Board to select for hearing only those motions *reliably* indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children" (450 U.S. at 143; footnote omitted; emphasis added). It is equally obvious that the degree of specificity of unsupported allegations bears little relationship to their reliability. It is not the detail of the allegations but rather their corroboration by sworn statements or other evidentiary material that permits the Board to cull out from the hundreds of motions to reopen received each year those few cases in which there is demonstrated some likelihood that the requested ultimate relief might be granted. Accordingly, 8 C.F.R. 3.8(a) makes no distinction between specific and conclusory al-

legations in its requirement that motions to reopen shall be supported by affidavits or other evidentiary material.[5]

When presented with this analysis in the INS's rehearing petition, and confronted with the fact that its decision squarely conflicted with this Court's decision in *Wang*, the court of appeals reacted by deleting the paragraph of its opinion that had excused noncompliance with the Board's regulation and had attempted to distinguish *Wang*, but leaving its judgment requiring a remand intact. Hence, rather than conforming its ruling to the controlling decision of this Court, the court below simply ignored that decision. Such a result cannot be reconciled with our system of judicial review.

Our judicial system depends on the principle that lower courts will follow the law as construed by higher courts. Decisionmaking in this Court and other appellate courts would be an empty ritual if the lower courts were free to pick and choose among judicial pronouncements. Here, however, the court of appeals has deliberately "ignored * * * the hierarchy of the federal court system created by the Constitution and Congress." *Hutto* v. *Davis*, No. 81–23 (Jan. 11, 1982) (per curiam), slip op. 5.[6] Although, as described above, this case is a

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[5] Indeed, Section 3.8(a)'s further requirement that motions to reopen "shall state the new *facts* to be proved at the reopened hearing" (emphasis added) itself contemplates some degree of specificity in the allegations in addition to the requirement of evidentiary support. This Court's references (450 U.S. at 143) to the "conclusory" nature of the allegations of extreme hardship in *Wang* and to the need for a showing of the *specific* recent events that would render deportation an extreme hardship thus indicate the Court's recognition of the need for specificity in the allegations as well as, not in place of, evidentiary support.

[6] Indeed, in view of the court of appeals' response to the INS' petition for rehearing, it is difficult to extend to the court below the benefit of the doubt that its disregard of this Court's holding in *Wang* was "unconscious[ ]." Compare *Hutto* v. *Davis*, *supra*, slip op. 5.

carbon copy of *Wang* in all relevant respects, the court of appeals chose to "disregard[ ]" as "unfortunate" (App. A, *infra*, 2a) respondents' failure to satisfy the very procedural requirement that this Court held mandatory in *Wang*.

It was not within the Ninth Circuit's authority to make such a choice. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto* v. *Davis*, *supra*, slip op. 5. See also *Sumner* v. *Mata*, No. 81–844 (Mar. 22, 1982) (per curiam). A "difference[ ] of opinion[ ]" with this Court does not free the judges of the Ninth Circuit from "doing their mortal best to discharge their oath of office" (*Sumner* v. *Mata*, 449 U.S. 539, 549 (1981)) by applying the law as announced by this Court. See *Stanton* v. *Stanton*, 429 U.S. 501 (1977).[7]

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[7] This case, unfortunately, is not an isolated instance of the Ninth Circuit's refusal to follow this Court's admonition that the Immigration and Nationality Act "commits [the] definition [of 'extreme hardship'] to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *INS* v. *Wang*, *supra*, 450 U.S. at 144. Our research indicates that, since *Wang* was decided, the Ninth Circuit has published 11 opinions in cases involving appeals from orders of the Board of Immigration Appeals refusing to suspend deportation proceedings because of the absence of a showing of "extreme hardship." The court of appeals reversed in eight cases and affirmed in only three cases. See 643 F.2d 640 (1981); *Santana-Figueroa* v. *INS*, 644 F.2d 1354 (1981); *Hamid* v. *INS*, 648 F.2d 635 (1981); *Hee Yung Ahn* v. *INS*, 651 F.2d 1285 (1981); *Barrera-Leyva* v. *INS*, 653 F.2d 379 (1981); *Mejia-Carrillo* v. *INS*, *supra*; *Sida* v. *INS*, 665 F.2d 851 (1981); *Prapavat* v. *INS*, *supra*; *Chae Kim Ro* v. *INS*, 670 F.2d 114 (1982); *Phinpathya* v. *INS*, *supra*; *Reyes* v. *INS*, 673 F.2d 1087 (1982).

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

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AUGUST 1982

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 80–7191

FRANCIS V. PEREZ AND HILDA B. PEREZ,
PETITIONERS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Submitted Feb. 12, 1981.
Decided April 23, 1981.

Before FARRIS and FERGUSON, Circuit Judges, and CRAIG *, District Judge.

PER CURIAM:

Francis and Hilda Perez petition for review of the decision of the Board of Immigration Appeals (BIA) denying their motion to reopen their deportation proceedings to suspend deportation pursuant to § 244(a)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254(a)(1).

Review in this petition is limited to the sole question of whether the BIA abused its discretion in determining that the Perezes had not made out a prima facie case of extreme hardship within the meaning of § 244(a)(1) of the Act. *Hun Chak Sun* v. *Immigration and Naturalization Service*, 415 F.2d 791 (9th Cir. 1969), *cert. denied*, 397 U.S. 908, 90 S.Ct. 905, 25 L.Ed.2d 89 (1970); *Loza-Bedoya* v. *Immigration and Naturalization Service*, 410 F.2d 343 (9th Cir. 1969).

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*Honorable Walter E. Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

It is recognized that the Act confers upon the Attorney General and his delegates the duty of interpreting the meaning of "extreme hardship." *Immigration and Naturalization Service* v. *Wang*, ___ U.S. ___, 101 S.Ct. 1027, 67 L.Ed.2d ___ (1981), *reversing*, *Wang* v. *Immigration and Naturalization Service*, 622 F.2d 1341 (9th Cir. *en banc* 1980). Though the holding of this Circuit in *Wang* was that the Attorney General must employ a liberal interpretation of "extreme hardship" to effectuate the ameliorative purpose of the Act, 622 F.2d at 1346, the Supreme Court, in reversing this circuit, has held that the Attorney General has the discretion to interpret the Act strictly. ___ U.S. at ___, 101 S.Ct. at 1030. Despite 8 C.F.R. §§ 103.3 and 242.18(a), the BIA has not indicated in this case the factors it considered in concluding that the Perezes failed to establish a *prima facie* case of extreme hardship. The lack of a record of the BIA proceedings forecloses even the strict review contemplated by the Supreme Court in its decision of *Wang*. For that reason the decision of the BIA in this petition is vacated and remanded for reconsideration. Any subsequent BIA decision is to be based upon a record developed in accordance with 8 C.F.R. § 103.3.

The failure of the Perezes to support their petition with affidavits is unfortunate, but will be disregarded. In this respect this petition can be distinguished from *Wang* because, unlike the conclusory allegations set forth by the petitioners in *Wang*, the Perezes have made highly specific allegations of extreme hardship which still permit "the Board to select for hearing only those motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship for the alien or his children." *Wang*, supra, ___ U.S. at ___, 101 S.Ct. at 1030.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80–7191

FRANCIS V. PEREZ AND HILDA B. PEREZ,
PETITIONERS,

V.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Filed Dec. 7, 1981

ORDER AMENDING OPINION

Before: FARRIS and FERGUSON, Circuit Judges, and CRAIG, * District Judge

The opinion filed April 23, 1981 (643 F.2d 640) is amended as follows: Delete the final paragraph on page 641, beginning "The failure of the Perezes ..." in its entirety.

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* Honorable Walter E. Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

March 18, 1980

Files: A22 459 561—San Francisco
A22 459 562

In re: FRANCIS V. PEREZ
HILDA B. PEREZ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
E. Alan Nunez, Esquire
P.O. Box 42103
San Francisco, California 94101

ON BEHALF OF I&N SERVICE:
Brian H. Simpson
Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant visitor—remained longer than permitted (both respondents)

APPLICATION: Reopening of proceedings

These cases present a motion to reopen these proceedings to afford the respondents an opportunity to apply for suspension of deportation, pursuant to the provisions of section 244(a)(1) of the Immigration and Nationality Act, as amended. A stay of deportation was granted by the Board on February 6, 1980. The motion will be denied.

The respondents, who were granted ninety days for the privilege of voluntary departure more than three

years ago, entered the United States as visitors for a temporary period. They were married in a civil ceremony only five days after the male respondent's arrival here. They became the parents of a United States citizen child long after both respondents had entered into illegal status as of September 16, 1972. Their motion to reopen to apply for adjustment of status, pursuant to section 245 of the Act, was denied by the immigration judge in July 1977, and his decision was affirmed by the Board in November 1977.

The respondents now have apparently resided continuously in the United States for over seven years. The Service, in opposition to the instant motion, contends that "it is obvious .... that respondents have carefully engineered the prolongation of their stay in the United States to meet the minimum seven years physical presence requirement".

We are not satisfied that the respondents have made a prima facie showing that they or any other person would suffer "extreme hardship" if they were deported. In the absence of such a showing, one of the eligibility requirements for relief under section 244(a)(1) of the statute, reopening of these proceedings is not warranted. *See* 8 C.F.R. 3.8. It appears that the respondents still are attempting to engage in piecemeal litigation. Accordingly, the motion to reopen the proceedings will be denied.

ORDER: The motion to reopen is denied.

/s/ _____

DAVID L. MILHOLLAN
Chairman

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80–7191

FRANCIS V. PEREZ AND HILDA B. PEREZ,
PETITIONERS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Filed May 10, 1982

ORDER

Before: FARRIS and FERGUSON, Circuit Judges, and CRAIG,* District Judge.

The panel as constituted in the above case has voted to deny th petition for rehearing and Judges Farris and Ferguson have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and a judge in active service requested that a vote be taken. Fed. R. App. P. 35(b). Upon the vote of the judges in active service, a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Walter E. Craig, Senior United States District Judge for the District of Arizona, sitting by designation.